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HAROLD B. WILLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

NO. 369

KEYSTONE METAL COMPANY, Petitioner,

v.

CITY OF PITTSBURGH, JAMES P. KIRK, Treasurer of the City of Pittsburgh, SCHOOL DISTRICT OF PITTSBURGH, et al., etc., Respondents.

PETITION OF KEYSTONE METAL COMPANY FOR REHEARING OF ORDER DENYING WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petitioner, Keystone Metal Company, respectfully prays for a rehearing of the order issued on November 16, 1953, denying petitioner's prior petition for a writ of certiorari to the Supreme Court of Pennsylvania.

QUESTION PRESENTED

Whether the proceeds of a sale between a seller and a buyer both located in the taxing state involving the shipment of goods from a point of origin *outside the taxing state* to a point of destination in another state *outside the taxing state* are exempt from taxation under Article I, Section 8, of the Constitution of the United States.

APPLICATION OF QUESTION PRESENTED TO FACTS IN THIS CASE

Substantially all the sales in issue in the instant case involve shipment *from* a point outside the taxing state *to* a point in another state outside the taxing state. In a few instances, however, the sales involve shipment from a point of origin *within* the taxing state. In *all* instances, however, the shipment is to a point of destination outside both the taxing state and the state of origin. The court to which the writ of certiorari is directed drew no distinction between the two classes of sales. Since petitioner is of the opinion that in all events sales of the type described in the question presented are protected from local taxation by Article I, Section 8, of the Constitution, those sales in particular are singled out as affording complete grounds for granting of certiorari here.

GROUNDS FOR REHEARING

I.

There is now pending in the Supreme Court of Indiana (Cause No. 28948) an appeal from the Marion Superior Court, Room 3, of Marion County, Indiana, in a case entitled Gross Income Tax Division of the State of Indiana, appellant, v. L. S. Ayres and Company, appellee, involving the question of the taxability of sales by the state of the buyer and seller where shipment is from a point of origin within the taxing state to a point of destination outside the taxing state. The decision rendered by the court below in that case squarely contradicts the decision of the Supreme Court of Pennsylvania in petitioner's case and, if affirmed on appeal, will result in a direct conflict between the two highest courts of the states of Pennsylvania and Indiana on the important question of taxability of interstate sales, where the taxes involved are on the privilege of engaging locally in interstate business.

II.

The decision of the Supreme Court of Pennsylvania in the instant case stands alone in upholding the taxability by the state of the buyer and seller of the proceeds of sales involving shipment from one point outside the taxing state to another point outside both the taxing state and the state of origin, and, of even greater importance, is inconsistent with the great body of regulatory law in effect in the substantial number of states having sales and gross receipts taxes.

The following nineteen states and the District of Columbia have rules or regulations specifically exempting

sales between a buyer and a seller located in the taxing state where the shipment originates *in* the taxing state but the *destination* is *outside* the taxing state:

Alabama, Rule I 14-012-014
California, Ruling No. 2015(C)
Colorado, Rule No. 45(B)
Dist. of Col., Reg. Sec. 401(1)
Florida, Rule 64
Illinois, Art. 5, II 2
Iowa, Rule No. 180, 2
Kansas, Reg. 94-6-8-C-1
Louisiana, Art. 2-29
Maryland, Rule No. 64
Michigan, Rule No. 41
Missouri, Reg. N(e)
North Dakota Rule No. 37
Ohio, Rule 139
Pennsylvania, Reg. 251
Rhode Island, Reg. 6/30/47
South Carolina, Reg. 33
South Dakota, Reg. IV(1)(A)(b)
Utah, Reg. 44
Washington, Rule 193

Only two states having sales or gross receipts taxes have attempted to impose their taxes on sales of the above character, and, of these, the state of Mississippi specifically exempts a sale of the type principally involved in the instant case, where the shipment both *originates* and *terminates* outside the taxing state (Rule No. 38).

Petitioner has been able to discover no instance in which a state having a sales or a gross receipts tax attempts to tax sales involving different states of origin and destination outside the state of the buyer and seller.

It is of vital importance, therefore, that the lone exception to the immunity granted to interstate sales of the type here involved be considered by this Court promptly and decisively to the end that some measure of stability in the treatment of transactions of this nature may be preserved. Otherwise, it is inevitable that the judicial floodgates will be opened and even sales of the type involving *destination only* outside the taxing state will become the subject of widespread litigation, leading to the substitution of judicial chaos and uncertainty for clarity and stability.

Conclusion.

Petitioner respectfully suggests with respect to Ground I of this Petition that if your Honorable Court prefers to await the decision by the Supreme Court of Indiana in Cause 28948 pending in that court to determine whether or not a conflict will materialize between the highest courts of two states, the decision on the present petition for rehearing might be postponed until that time.

Respectfully submitted,

KEYSTONE METAL COMPANY, Petitioner

By EARL F. REED

LEE W. ECKELS

Attorneys

CERTIFICATE OF COUNSEL PURSUANT TO RULE 33(2)

Counsel for petitioner hereby certifies that this Petition is presented in good faith and not for delay and that the Petition is restricted to the grounds above specified.

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By EARL F. REED

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BRIEF IN OPPOSITION TO PETITION FOR REHEARING OF ORDER DENYING WRIT OF CERTIORARI

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Respondents, City of Pittsburgh and the School District of Pittsburgh et al., respectfully request Your Honorable Court to deny the Petition filed herein by Keystone Metal Company for rehearing of Order issued on November 16, 1953, denying its Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania, for the following reasons:

I. Petitioner States No Grounds Available and Not Previously Presented.

The Petition for Rehearing states no new facts, no new or additional circumstance of an exceptional character and no new or additional federal question of sub-

stance not heretofore determined by this Court. All available reasons or grounds which could be addressed to this Court for assuming jurisdiction and granting a Writ of Certiorari were fully and exhaustively presented by Petitioner in its brief submitted in support of the Petition for the Writ. No other facts, circumstances, reasons or grounds are suggested in the Petition for Rehearing.

The argument now made that the decision of the Supreme Court of Pennsylvania opens the judicial flood gates to wide spread litigation, judicial chaos and uncertainty was presented, without merit, in Petitioner's brief in support of the Petition for the Writ. No merit is added to that argument by Petitioner's present reliance upon the *possibility* that a decision *not yet made* may be in conflict with the decision *already made* in the instant case by the Supreme Court of Pennsylvania. (See Page 3 of Petition for Rehearing.)

II. The Petition for Rehearing States No Intervening Circumstances of Substantial or Controlling Effect, as Contemplated by Rule 33, Section 2.

Petitioner now bases its contention on a case *pending in but not yet decided* by the Supreme Court of Indiana. As to that case, pending when Petition for the Writ was filed, one can only speculate as to what the decision will be. On the merits, the pending Indiana case involves a gross income tax. Respondent's mercantile taxes are imposed on the privilege of vending or selling within their co-terminous territorial limits—a tax altogether different in character, imposition and impact. Whether or not a *future* decision by the Indiana Supreme Court is in conflict with the challenged decision of the Pennsylvania

Supreme Court is completely beside the point. The real issue will be whether or not the facts and issues of the pending case are so decided as to conflict with the decisions of this Court.

Petitioner's position, therefore, rests on matters far too remote, uncertain, speculative and nebulous to merit consideration as sound and compelling reasons for either granting the Petition for Rehearing or for postponing a decision thereon until the pending Indiana case is decided.

Petitioner argues now that the decision of the Pennsylvania Supreme Court violates a great body of regulatory law in a substantial number of States having sales and gross receipts taxes. In citing, but not giving the substance of the regulations of nineteen States *including Pennsylvania,* Petitioner does not in any manner identify the type of tax to which they apply. Respondents readily admit that regulations may and do differ, but that is of no argumentative significance. Rules and regulations are merely administrative implementations of the taxing statute or ordinance. As such, they must be *within* the scope of, and consistent with, the tax legislation to which they apply. The Appellate Courts of Pennsylvania have upheld Respondents' mercantile tax rules and regulations. In any event, Regulations are not basic law; they stand or fall with the statute they implement.

The regulations relied on by Petitioner all relate to receipts from sales made by a *seller within* a state to *customers in other states.* Respondents admit that in such cases the receipts are not, under the commerce clause, subject to tax. In fact, the tax act and the tax ordinance as well as the regulations thereunder exempt

from the tax the receipts from any business "not within the taxing power of the Commonwealth under the Constitution of the United States." In the instant case the receipts taxed came from *purely local* transactions, fully consummated *within Pittsburgh* between a *Pittsburgh seller* and a *Pittsburgh buyer,* the goods having never been in Pennsylvania. Under Respondents' tax, it isn't commerce, but the *privilege* of selling that is taxed, with no discrimination whatsoever against interstate commerce and imposing no direct burden thereon. All along, Petitioner has confused the *taxing state* with the *state wherein the exercise of the privilege of selling* is what is taxed.

Respondents submit the tax here challenged is not prohibited by the Constitution of the United States.

III. Respondents Rely on Their Brief in Opposition to Granting a Writ of Certiorari.

In that brief authorities are cited in support of Respondents' position. While applicable to matters raised in the Petition for Review, the arguments and authorities cited therein need not be repeated here.

Conclusion.

Petitioners instant argument presents no additional ground for the assumption of jurisdiction by this Court, no exceptional circumstances, no federal question of substance not heretofore determined by this Court, no reason why Respondents' tax is not valid and constitutional and no compelling intervening circumstance, and hence no reason for reconsideration, immediate or postponed. The argument now made on the basis of apprehensive speculation is untenable. Each case must rest on its own facts. On that basis this Court has already spoken with respect to the instant case, and correctly. Wherefore, Respondents pray this Court to deny the Petition for rehearing.

Respectfully submitted,

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